THE HON'BLE SRI JUSTICE C.V. RAMULU

Friday, 7th day of December,2007

W.P.No.1046 of 2007

Between:-

C. Rajesh Chetty … Petitioner

and

The Union of India, rep. by its
Defence Secretary, New Delhi
and others … Respondents

THE HON'BLE SRI JUSTICE C.V. RAMULU

W.P.No.1046 of 2007

ORDER:

This Writ Petition is filed seeking a Mandamus declaring the action of respondents 2 and 3 in seeking to prosecute the petitioner for the second time under General Court Martial for the same charges/offences pursuant to the Communication of 54 Division Signal Regiment in Letter No.15665549/01/CRC/180, dated 30.12.2006 of the 3rd respondent as arbitrary, illegal and contrary to the procedure

contemplated under the Army Act and the Rules framed thereunder, apart from being violative of Fundamental Right guaranteed under Article 20 of the Constitution of India and consequently, to direct the respondents not to proceed with the General Court Martial against the petitioner.

Through the impugned Proceedings dated 30-12-2006, petitioner was intimated that General Court Martial would be held in the third week of January,2007 in 54 Infantry Division for the offences under Section 69 of the Army Act,1950 (for short 'the Act') as intimated vide Headquarter 54 Inf.Division Letter No.5004/GCM/RC/A3/16, dated 27-12-2006. He was also informed that he was at liberty under Rule 33(7) of the Army Rules,1954 (for short 'the Rules') to nominate a defence counsel/ defending Officer/defence witness and intimate the preference to the 3rd respondent' Office.

It is the case of the petitioner that he was enrolled in the Corps of Siganls of Indian Army on 27-2-1997 and so far put in 10 years of service. He was posted under the 3rd respondent during July,2004 and worked in the Officers' Mess of the Unit. According to the petitioner, he performed duties to the utmost satisfaction of his superiors. While so, he was wrongly implicated in commission of certain theft during April,2005 by Thirumalgherry Police of Secunderabad. Series of criminal cases were foisted against him vide Crime Nos.62, 63 and 64 of 2005 under Section 379 of the Indian Penal Code. After registration of FIRs, he was produced before the XI Additional Chief Metropolitan Magistrate, Seccunderabad. According to the petitioner, he was absolutely innocent of the allegations made against him in the above crimes and police have falsely implicated him for statistical purpose. After obtaining sanction from the 2nd respondent, the competent authority had taken over the pending

criminal cases against him as per Section 125 of the Act read with Rule 197-A of the Rules. Respondent No.2 having taken over the pending criminal cases from the criminal Court set the Army law in motion. Respondent No.3 commenced the disciplinary proceedings against him and he ought to have carried out the hearing of charge in terms of Rule 22 and filled in Appendix 'A' to AR 24/94. However, the 3rd respondent did not make available a copy of tentative charge sheet or Appendix 'A'. The summary of evidence in terms of Rule 23 of the Rules was recorded initially by Major Ramani followed by Major Naveen Xavier of 54 Infantry Division Signal Regiment. He was not informed of the replacement of Major Ramani with Major Naveen Xavier and the reasons for the change of Officer. The pre-trial advice documents have since been forwarded to GOC 54 Infantry Division/21 Corps Headquarters, whereafter he was served only with a charge sheet dated 17-7-2006. He was advised to plead guilty of the charges or else he will be mulcted with severe punishment disproportionate to the charges framed against him. He was not aware of the intricacies of the system. Though he was unnecessarily implicated in false charges by the civil police, he pleaded guilty of the charges. Respondent No.3 passed an Order dated 24-7-2006 awarding punishment of deprivation of appointment of Unpaid Lance Naik and to suffer rigorous imprisonment in military custody for a period of 2 months and 29 days. Respondents immediately put him into Quarter Guard to undergo the sentence as ordered. Unit Part II Order 167/1336, dated 24-7-2006 was published to this effect. The sentence was also informed to his wife i.e. next kin vide letter dated 24-7-2006. After completion of 51 days of sentence, on 11-9-2006 he was released from military custody. The respondents while releasing him informed that the sentence of rigorous imprisonment was remitted and accordingly, he

was being released. While that being so, to his dismay, he was again taken into military custody in the third week of November,2006. When he asked the 3rd respondent about the arrest, he was not informed of the charge/charges for which he was again taken into military custody. His request for interview and provision of documents etc., has been turned down by respondents. He was detained illegally from the 3rd week of November,2006 till the date of filing of Writ Petition i.e. 19-1-2007. However, he was informed by the 3rd respondent through the impugned letter that he will be now tried by a General Court Martial in the 3rd week of January,2007 at the unit location for commission of offences under Section 69 of the Act as per the Order of the 2nd respondent dated 27-12-2006. Further, a copy of the said Order is not made available to him. Having no option, he asked for providing certain mandatory documents vide letter dated 31-12-2006 addressed to the 3rd respondent, but he was not given any reply nor the documents were furnished as sought for. According to the petitioner, after 24-7-2006 he did not commit any offence and the 2nd respondent is planning to try him by convening a General Court Martial for the very same offences for which he was already tried and sentenced by Summary Court Martial presided over by the 3rd respondent and the same is prohibited under Section 121 of the Act. Further, there is no response from the respondents and as such, he submitted another representation dated 8-1-2007 requesting them to reconsider the proposal for holding the General Court Martial, but there was no decision on the said representation. Therefore, the action of the respondents in seeking to conduct trial repeatedly and impose double punishment on him is arbitrary, illegal and contrary to the provisions of the Act and the Rules framed thereunder, apart from

being violative of the fundamental right guaranteed under Article 20 of the Constitution.

A detailed counter affidavit has been filed on behalf of the 2nd respondent denying the allegations made by the petitioner. It is asserted that the petitioner was released from military custody on 11-9-2006 after the Summary Court Martial proceedings were set aside by the General Officer Commanding 54 Inf.Division, since the Summary Court Martial was conducted without any jurisdiction and the same was intimated to the petitioner. It is not correct to say that the petitioner was informed that his sentence of imprisonment has been remitted. Petitioner was informed that he will be tried by the General Court Martial in the third week of January,2007 in the Unit office for commission of offence under Section 69 of the Act basing on the letter received from the Headquarters dated 27-12-2006. Petitioner was, in fact, provided with General Court Martial Proceedings on 13-1-2007 though there is no provision for providing the same to the accused person. Insofar as copy of the charge sheet for trial by General Court Martial was concerned, the same will be provided to the petitioner immediately after convening Order for General Court Martial is issued. The General Court Martial is yet to be convened. Regarding providing of documents to the petitioner vide his letter dated 31-12-2006, he was explained at what stage the documents can be provided to him. Since the earlier trial of the petitioner by Summary Court Martial was held without endorsing on the charge sheet the orders of convening authority for trial of the petitioner, the trial was rendered void *ab initio* being held without jurisdiction in terms of Section 120(2) of the Act. Thus the earlier trial amounted to no trial being held. Hence, the provisions of Section 121 of the Act are not attracted in this case. However, the fact that the petitioner having

spent 51 days in military custody will be taken into consideration and will be given set-off, if the petitioner is found guilty of the offences by General Court Martial.

Learned counsel for the petitioner strenuously contended that Sections 116 to 120 of the Act deals with Summary Court Martial which is held by the Commanding Officer. Subject to provisions of sub-section (2) of Section 120 of the Act, the summary court martial has all the powers to try any offence punishable under the Act. A summary court martial may try any person, subject to Army Act and under the command of the Officer holding the Court, except an officer, junior commissioned officer or warrant officer. A summary court martial may pass any sentence, which may be passed under the Act, except a sentence of death or transportation or of imprisonment for a term exceeding the limit specified in sub-section (5) of Section 120 of the Act. Thus, it is obvious that the summary court martial has all the power to try all the offences, except grave offences known to military law. The Commanding Officer is supposed to submit to the higher authorities any cases, which appear to require more exemplary punishment than summary court martial can award. The commanding officer is the best and sole judge and he is supposed to refer the matter in a case where it would ordinarily be referred to the Officer empowered to convene District Court Martial/General Court Martial. In this regard, learned counsel has drawn attention to Section 162 of the Act, which reads as under:

> "**162. Transmission of proceedings of summary courts-martial:-** The proceedings of very summary court-martial shall without delay be forwarded to the officer commanding the division or brigade within which the trial was held, or to the prescribed officer; and such officer, or the Chief of the Army Staff, or any officer empowered in this behalf by the Chief of the Army Staff, may, for reasons based on the merits of the case, but not any merely technical grounds, set aside the proceedings or reduce the sentence

to any other sentence which the court might have passed."

Further, the reviewing authority can for reasons based on 'merits of the case', but not merely on technical grounds, set aside the proceedings or mitigate, remit or commute the sentence. If the sentence is illegal, he must set aside or under Section 163 of the Act, a valid sentence may be substituted by one of the authorities in Section 179 of the Act. In fact, Rule 133 of the Rules contemplates as to review of proceedings. The proceedings of a summary court martial shall, immediately on promulgation, be forwarded to the Officer authorized to deal with them in pursuance of Section 162 of the Act. After review by him, they will be returned to accused person's corps for preservation in accordance with Rule 146(2) of the Rules. Learned counsel further contended that even if the 3rd respondent has erred, the sentence, which the petitioner had undergone, cannot be vitiated for no fault of him. The said provisions clearly indicate that the sentence cannot be set aside on technical grounds, but can be set aside only on merits of the case. Since the petitioner has undergone substantial period of sentence in military custody, i.e. 51 days out of 89 days, he should not be made to undergo trial again under the general court martial, which is constituted for trying the very same offence.

Learned counsel appearing for respondents submitted that since the earlier trial of the petitioner by summary court martial was held without endorsing on the charge sheet, the orders of the convening authority for trial of the petitioner was rendered void *ab initio* being held without jurisdiction in terms of Section 120(2) of the Act; thus, the earlier trial amounted to no trial being held. Hence, the provisions of Section 121 of the Act are not attracted in this case. However, the fact that the petitioner having spent 51 days in the army custody will be taken into consideration and will be given set off, if he is found guilty

by the general court martial. In support of his contention, learned counsel relied upon the decision reported in **EX-HAVILDAR RATAN SINGH v. UNION OF INDIA**[1] and drawn attention of the Court to paragraphs 3 and 4, which read as under:

> "3. Although a number of questions were raised in the writ petition and the special leave petition, the ground urged by the learned counsel for the appellant before us is confined to one point. It has been contended that having regard to the nature of the charge against the appellant, the provisions of Section 34 of the Army Act, 1950 (hereinafter referred to as the Act) are attracted, and in view of Section 120(2) of the Act, trial by summary not permitted. The learned counsel has placed the relevant provisions of the Act indicating that the appellant would have been entitled to a qualitatively better right of defence before a court martial other than a summary court martial, which was denied to him on a wrong assumption that the case was covered by Section 36, and not by Section 34. The question, which arises in this case, is whether the Summary Court Martial had jurisdiction to try the appellant in the facts as alleged in the present case.
>
> 4. The charge sheet states that when fired upon by a group of terrorist-militants during an armed operation against them, the appellant quitted his place without orders from his superior officer. Section 120 of the Act states that subject to the provisions of sub-section (2) of the section a summary court martial may try any offence punishable under the Act, sub-section (2) reads as follows:-
>
> > "(2) When there is no grave reason for immediate action and reference can without detriment to discipline be made to the officer empowered to convene a district court-martial or on active service a summary general court martial for the trial of the alleged offender, an officer holding a summary court-martial shall not try without such reference any offence punishable under any of the Sections 34, 37 and 69, or any offence against the officer holding the Court."
> >
> > The position, thus, is that if the offence is covered by Section 34 and immediate action for the specified reasons is not warranted, the summary court martial shall not have jurisdiction to hold the trial."

I have given my earnest consideration to the respective submissions made by the learned counsel on either side and perused

the impugned Proceedings and other material made available on record.

The following short but important question arises for consideration in this Writ Petition.

> Whether the respondents were correct in conducting General Court Martial for trying the petitioner for the very same offences for which he was tried by Summary Court Martial and sentenced to undergo rigorous imprisonment of 2 months 29 days, particularly after he had undergone sentence of 51 days – does it not amount to double jeopardy?

Before going into the merits, it may be relevant to notice the following provisions of law under the Act, which read as under:

> "**69. Civil offences—**Subject to the provisions of Section 70, any person subject to this Act, who at any place in or beyond India, commits any civil offence, shall be deemed to be guilty of an offence against this Act and, if charged therewith under this section, shall be liable to be tried by a court-martial and, on conviction, be punishable as follows, that is to say,--
>
> (a) If the offence is one which would be punishable under any law in force in India with death or with transportation, he shall be liable to suffer any punishment, other than whipping, assigned for the offence, by the aforesaid law and such less punishment as is in this Act mentioned; and
>
> (b) In any other case, he shall be liable to be suffer any punishment, other than whipping, assigned for the offence by the law in force in India, or imprisonment for a term which may extend to seven years, or such less punishment as is in this Act mentioned.
>
> **70. Civil offences not triable by court-martial.**—A person subject to this Act who commits an offence of murder against a person not subject to military, naval or air force law, or of culpable homicide not amounting to murder against such a person or of rape in relation to such a person, shall not be deemed to be guilty of an offence against this Act and shall not be tried by a court-martial, unless he commits any of the said offences—
>
> (a) while on active service, or
>
> (b) at any place outside India, or
>
> (c) at a frontier post specified by the Central Government by notification in this behalf.

116. Summary court-martial.—(1) A summary court-martial may be held by the commanding officer of any corps, department or detachment of the regular Army, and he shall alone constitute the court.

(2) The proceedings shall be attended throughout by two other persons who shall be officers or junior commissioned officers or one of either, and who shall not as such, be sworn or affirmed.

120. Powers of summary courts-martial.—(1) Subject to the provisions of sub-section (2), a summary court-martial may try any offence punishable under this Act.

(2) When there is no grave reason for immediate action and reference can without detriment to discipline be made to the officer empowered to convene a district court-martial or on active service a summary general court-martial for the trial of the alleged offender, an officer holding a summary court-martial shall not try without such reference any offence punishable under any of the sections 34, 37 and 69, or any offence against the officer holding the court.

(3) A summary court-martial may try any person, subject to this Act and under the command of the officer holding the court, except an officer, junior commissioned officer or warrant officer.

(4) A summary court-martial may pass any sentence which may be passed under this Act, except a sentence of death or transportation, or of imprisonment for a term exceeding the limit specified in sub-section (5).

(5) The limit referred to in sub-section (4) shall be one year, if the officer holding the summary court-martial is of the rank of lieutenant-colonel and upwards, and three months, if such officer is below that rank.

121. Prohibition of second trial:- When any person subject to this Act has been acquitted or convicted of an offence by a court-martial or by a criminal court, or has been dealt with under any of the sections 80, 83, 84 and 85, he shall not be liable to be tried again for the same offence by a court-martial or dealt with under the said sections.

161. Finding and sentence of a summary court-martial.—

(1) Save as otherwise provided in sub-section (2), the finding and sentence of a summary court-martial shall not require to be confirmed, but may be carried out forthwith.

(2) If the officer holding the trial is of less than five years

service, he shall not, except on active service, carry into effect any sentence until it has received the approval of an officer commanding not less than a brigade.

162. Transmission of proceedings of summary courts-martial.—The proceedings of every summary court-martial shall without delay be forwarded to the officer commanding the division or brigade within which the trial was held, or to the prescribed officer; and such officer, or the Chief of the Army Staff, or any officer empowered in this behalf by the Chief of the Army Staff, may, for reasons based on the merits of the case, but not any merely technical grounds, set aside the proceedings or reduce the sentence to any other sentence which the court might have passed."

It is also relevant to notice Rule 133 of the Army Rules, 1954, which reads as under:

"**133. Review of proceedings.**—The proceedings of a summary court-martial shall, immediately on promulgation, be forwarded (through the Deputy Judge-Advocate General of the command in which the trial is held) to the officer authorized to deal with them in pursuance of section 162. After review by him, they will be returned to the accused person's corps for preservation in accordance with sub-rule (2) of rule 146."

Section 116 of the Act deals with Summary Court Martial. It contemplates that a Summary Court Martial may be held by the Commanding Officer of any corps, department or detachment of the regular Army and he shall alone constitute the Court. Further, the proceedings shall be attended to throughout by two other persons, who shall be officers or junior commissioned officers or one of either and who shall not as such, be sworn or affirmed. Section 120 deals with the powers of summary court-martial. Section 121 deals with prohibition of second trial for the same offence. Section 69 contemplates that if a person employed in the army commits a civil offence, he shall be deemed to be guilty of an offence against the Army Act and if charged, he shall be liable to be tried by a court martial and

on conviction, be punishable only for the offence punishable with death or transportation for life etc. Section 70 deals with the civil offences, which are not triable by court-martial. It states that an offence of murder against a person not subject to military, naval or air force law, or of culpable homicide not amounting to murder against such a person or of rape in relation to such a person, shall not be deemed to be guilty of an offence against the Army Act and shall not be tried by a court-martial, unless such offence is committed while on active service or at any place outside India or at a frontier post specified by the Central Government by notification. A plain reading of Sections 69 and 70 of the Act would indicate that the offences charged against the petitioner do not fit into the teeth of these sections. Even assuming that it fits into the teeth of Section 69(b) of the Act, this is not one such offence. A reading of these provisions would show that the offences committed by the petitioner could not have been taken over by the court martial automatically. Section 161 contemplates that finding and sentence of a summary court martial shall not be required to be confirmed, but may be carried out forthwith. Thus, it must be deemed that the revision of findings or sentence as contemplated under Section 160 is only the finding by the court martial and not by the summary court martial. Section 162 requires transmission of proceedings by the summary court martial. It contemplates that the proceedings of summary court martial shall not be reversed on any technical grounds.

In the case on hand, the first trial under summary court martial was completed and the petitioner was sentenced to undergo rigorous imprisonment under army custody for 2 months and 29 days and he had undergone 51 days imprisonment and thereafter he was let-off on the ground that he is liable to be retried, since summary court martial

has no power to try for the offence charged. In the entire counter and the arguments advanced by the learned counsel for respondents, they simply stated that the trial was not conducted as per Sections 39(a) and 54(b) of the Act; therefore, the general court martial was directed to be conducted as per the advice of the Headquarters. This seems to be *ex facie* illegal. Petitioner had undergone the ordeal of trial and now asking him to face the general court martial is nothing but giving a scope for the authorities to improve the case and to punish him for the second time. May be, petitioner is entitled to remission for the period of sentence already undergone by him, but that itself does not mean that the authorities can conduct a second trial and punish him. This is contrary to Section 121 of the Act, apart from being violative of Article 20 of the Constitution. It appears, since the petitioner has pleaded guilty, he was proceeded with summary court martial and the punishment was imposed. Why that was not accepted by the higher authorities saying that the summary court martial has no jurisdiction to do so is not forthcoming.

The judgment relied upon the learned counsel for the respondents in **EX-HAVILDAR RATAN SINGH**'s case (supra) is contra to the proposition that arises for consideration in this case. That was a case where the accused went before the court and stated that summary court martial has no jurisdiction to try the case and it is for the general court martial, which was supposed to conduct trial; therefore, sought for quashing of the said proceedings. This is not one such case. This is a case where the authorities have, invoked a particular provision of law and then tried the petitioner and convicted him and the petitioner had also undergone 51 days imprisonment out of 89 days. Therefore, the said decision has no relevance to the facts of the present case. In this case, it is the authorities, who say that the officer,

who conducted the summary court martial has no jurisdiction to conduct trial and, therefore, the conviction was set aside and retrial was ordered to be conducted by general court martial.

Section 120(2) of the Act contemplates that when there is no grave reason for immediate action and reference can without detriment to discipline be made to the Officer empowered to convene a district court martial or on active service, a summary court martial for the trial and the alleged offender, an officer holding a summary court martial shall not try without such reference, any offence punishable under any of Sections 34, 37 and 69 of the Act, or any offence against the officer holding the court. The case on hand is not one such case. This is a case where the petitioner was involved in a theft of private property and the local police had registered cases against him. After registration of FIRs, he was produced before the competent criminal Court. At that stage, the matter was taken over by the summary court martial and tried the petitioner. In fact, in such offences, it is not unusual to notice that hardly any person is convicted by the criminal courts. In this case, petitioner was convicted and sentenced to 89 days rigorous imprisonment, since he had admitted the guilt. He had undergone 51 days imprisonment by the time he was released from the military custody on the ground that the summary court martial conducted was not proper and he shall be tried again by the general court martial. Therefore, putting the petitioner again for trial before the general court martial is not warranted. It was only a technical matter and in fact, the Act itself (Section 162) contemplates that whenever a review is contemplated by the higher authority, it shall see that the accused is not punished for trivial things and if that is so, the reviewing authority can set aside the punishment and it shall not return or remand the matter for reconsideration on technical grounds. Here, in

this case, the lack of jurisdiction of summary court martial, even if assuming to be true is only technical in nature. Petitioner has suffered all the ordeals of army trial and he has undergone the punishment of 51 days out of 89 days. Therefore, it cannot be said that he can be retried by general court martial on the technical grounds. This definitely amounts to harassing the petitioner mentally and physically to undergo a second ordeal of trial, which amounts to double jeopardy, which is prohibited under Section 121 of the Act and is violative of Article 20(2) of the Constitution. A charged officer, who has been sentenced either after trial by a summary court martial or general court martial etc., may take advantage of certain technicalities as to the jurisdiction of the authority conducting the trial and imposing the punishment. But, it is not the scheme of the Act that an authority reviewing can also set aside the order of punishment imposed by the summary court martial after full trial, on mere technical grounds. In fact, the Order dated 11-9-2006 passed by the General Officer Commanding, 54 Infantry Division reads as under:

> "I set aside the proceedings, I direct that the Accused be released from custody and relieved of all consequences of trial."

This, in fact, indicates something in favour of the petitioner and not in favour of the respondents for conducting a second trial. As stated above, the letter or proceedings dated 27-12-2006 of the Headquarters, 54 Infantry Division is not placed before this Court. It may also be noticed that the petitioner after being released from military custody on 11-9-2006 was again detained in the third week of November,2006 till the date of filing of the Writ Petition i.e. 19-1-2007. In view of the above, respondents shall not again send the petitioner to military custody on the ground that he had completed only 51 days of sentence out of 89 day. For all the above reasons, I am of

the opinion that the order of retrial of the petitioner by the general court martial is arbitrary, illegal, contrary to Section 121 of the Act and violative of Article 20(2) of the Constitution of India and as such, the impugned Order is liable to be set aside and is accordingly set aside.

Accordingly, the Writ Petition is allowed. No order as to costs.

07-12-2007

prk

[1] AIR 1992 SC 415